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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHET DAVIDSON,

Claimant-Appellant,

v.

RIVERLAND EXCAVATING, INC.,

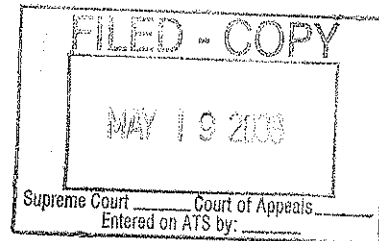
Employer-

and

**STATE INSURANCE FUND, Surety;
STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,**

Defendants-Respondents.

SUPREME COURT NO. 34626



**BRIEF OF RESPONDENT
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND**

**APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF
IDAHO**

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STATEMENT OF THE CASE

Chet Davidson (hereinafter "Davidson") appeals from the Findings of Fact, Conclusions of Law and Order of the Idaho Industrial Commission, which found that he was entitled to a 19% whole person impairment for injuries arising from his 1999 industrial accident. Davidson had asserted that he was entitled to total and permanent disability or, in the alternative, disability in excess of his physical impairment. The Industrial Commission found that Davidson was not totally and permanently disabled and did not have any disability in excess of his impairment.

STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

Davidson sustained an injury as the result of an industrial accident in November of 1999, while working for Riverland Excavating, Inc., (hereinafter "Riverland"). This eventually led to three cervical fusion surgeries, the last of which was in February, 2005. Davidson has not worked since December, 1999, shortly after the industrial accident.

Davidson, at the time of the hearing before the Industrial Commission, was 55 years of age. He graduated from high school at Big Horn, Wyoming, in 1967. (Hearing Transcript, p. 18) Davidson has had no formal training or education since high school. His testimony at the hearing was that he worked in construction, operating heavy equipment and road building, long haul truck driving, and was also a professional rodeo cowboy. (Hearing Transcript, p. 19-20)

Despite his testimony of a long and strenuous career, his Social Security earnings record (Defendant's Exhibit 1) cast doubt on much of Davidson's testimony concerning

his prior work life. Beginning with 1980 through the present, Davidson's reportable income could best be described as minimal. In fact, only in the years 1987 and 1999 did Davidson have any type of income that would indicate regular full-time employment for more than a few weeks. For the ten-year period prior to his employment in 1999 by Riverland, he had total income of \$1,722. In reality, Davidson did not work for the ten-year period prior to his employment with Riverland in 1999. Davidson did testify to doing some odd jobs under the table for his friend and drinking partner Jim Nirk, some occasional backhoe work, taking care of bison, and moving recreational vehicles during the 1990s. (Hearing Transcript, pp. 97-98)

Davidson had undergone three lower back surgical procedures in the 1970s as a result of a car accident, a rodeo injury when a horse fell on him, and an industrial injury when he was thrown off a scraper. He testified that he was not slowed down at all by the three lumbar surgeries. (Hearing Transcript, p. 27) Davidson also testified to injuring both his left and right knee although he apparently functioned adequately after each injury.

In 1988 Davidson injured his neck while working for Northwest Mono Roofing in The Dalles, Oregon. The claim was litigated due to statements from co-workers that Davidson had hurt himself in a fall while fishing on the Columbia River. (Defendant's Exhibit 4, p, 296) In March of 1990, Dr. Vincent, a Spokane neurosurgeon, performed a discectomy at L5-6. Davidson did not cooperate with vocational efforts by the Washington Department of Labor and Industries and walked out of the pain clinic he was

referred to. (Defendant's Exhibit 4, p. 676) Davidson repeatedly asserted that he was totally disabled. He eventually received a category four whole person impairment for his cervical spine after re-opening his claim. (Defendant's Exhibit 4, p. 952)

Davidson's final industrial accident occurred in November 1999 when he injured his neck while attempting to lift a hydraulic chair into a Case loader. According to Davidson, the chair slipped out of his hands landing on his head. (Hearing Transcript, pp. 38-39) The complaint filed by Davidson indicated that the accident occurred on December 30, 1999. (Hearing Transcript, p. 40)

The first medical treatment Davidson received occurred at North Idaho Immediate Care Center on January 4, 2000. Davidson was eventually referred to neurosurgeon Jeffrey D. McDonald, M.D. The first procedure performed by Dr. McDonald was a discectomy and fusion in August 2001 at C4-C5 and C6-C7. Repeat surgery was performed on June 10, 2003, consisting of removal of the anterior cervical hardware at C6-C7 and revision of the discectomy and fusion, along with internal fixation. It was noted in September 2003 that Davidson had developed a drooping eyelid known as a "Horner Syndrome". A third surgical procedure was done by Dr. McDonald in February 2005, again removing the cervical hardware at C6-C7 and performing a revised anterior discectomy and fusion. (Defendant's Exhibit 2)

A June 2002 independent medical evaluation performed after Davidson's first surgery resulted in a 15% whole person impairment rating and a recommendation that Davidson could return to light and medium work activities. (Defendant's Exhibit 7, p. 1006)

In January, 2006, Davidson was seen for an independent medical evaluation by Dr. Ronald Vincent. Dr. Vincent indicated initially that Davidson was a candidate for a pain clinic. Dr. McDonald had previously found Davidson medically fixed and stable in October 2005. Dr. McDonald concurred with Dr. Vincent that Davidson would be a candidate for a pain management program, but in a February 17, 2006, letter to the State Insurance Fund stated that Davidson would not consent to treatment at a pain clinic. (Defendant's Exhibit 2, p. 12)

After learning Davidson refused to consider treatment at a pain clinic, Dr. Vincent rated Davidson with a 15% impairment as a result of the 1999 injury and restricted Davidson to medium-duty work. Dr. McDonald initially agreed with the conclusions and recommendations of Dr. Vincent as to the 15% rating. (Defendant's Exhibit 2, p. 4) Dr. McDonald, however, indicated he would restrict Davidson to light and sedentary work due to his acknowledged level of pain. (Defendant's Exhibit 2, p. 4) Eventually, in a letter to legal counsel, Dr. McDonald equivocated on the 15% rating but failed to provide an impairment rating of his own. (Claimant's Exhibit 1)

In conjunction with the Industrial Commission litigation, Davidson was seen by Dick Vester, an optometrist in Wallace, Idaho, in September 2006. In a letter to Michael Verbillis, Dr. Vester indicated Davidson had some loss of visual field because of the Horner's Syndrome. (Claimant's Exhibit 9, p. 9). Dr. Vester noted the rest of the eye health was normal and there were no vision problems. *"Normally, a ptosis monocularly would not greatly impact a person with daily living activities. It could result in some problems with*

certain employment situations if it was important to see superiorly on one side.” Dr. Vester noted that Davidson did have 20/20 vision in both eyes corrected. (Claimant’s Exhibit 9).

Subsequent to the November 1, 2006, Industrial Commission hearing, Findings of Fact and Conclusions of Law were entered by the Industrial Commission on September 7, 2007. The Industrial Commission ultimately found that Davidson was entitled to a 15% whole person impairment for the injury to his cervical spine. In addition, Davidson was awarded a 5% whole person impairment for his loss of field of vision in the right eye resulting from the Horner’s Syndrome, which was a complication of his cervical surgery.

The decision of the Industrial Commission noted that Drs. Jessen and Larson rated Davidson’s cervical impairment at 15% whole person after his first surgery. The decision noted that Dr. Vincent determined that Davidson’s impairment from the 1999 accident remained at 15% whole person in the spring of 2006. In a note dated May 1, 2006, Dr. McDonald, the treating surgeon, agreed with Dr. Vincent’s 15% impairment rating. At a subsequent date, Dr. McDonald questioned the 15% rating, but provided no rating of his own. The Commission found that the evidence in this case was that Davidson sustained a 15% whole person impairment for his cervical injury.

The Industrial Commission also found a 5% whole person impairment for Davidson’s partial loss of his field of vision in the right eye. The Commission noted that total loss of vision in one eye is a statutory benefit pursuant to Idaho Code Section 72-428 and is rated at 30% whole person. The Commission found that a partial loss of the

peripheral visual field in one eye must necessarily result in an impairment significantly less than the total loss of vision in one eye and therefore found a 5% whole person impairment.

The Industrial Commission also ruled against Davidson as to the issue of disability in excess of impairment and total disability. The Commission found that Davidson had failed to carry his burden of proof that he was totally and permanently disabled as an odd worker. The Commission noted that Davidson had not sought work, did not enlist the aid of others to look for work on his behalf, and that there was no persuasive evidence that it would be futile for Davidson to look for work. The Industrial Commission relied upon Dr. Vincent, who indicated that Davidson was capable of sedentary and light work. Dr. McDonald, the treating surgeon, agreed with Dr. Vincent that Davidson should be restricted to light or sedentary work. Mr. Moreland, Davidson's own vocational expert, acknowledged that if Davidson could perform light work, there were plenty of jobs available within that limitation and consistent with his work skills. (Hearing Transcript, p. 144) Doug Crum, the vocational expert for the employer, likewise testified that based upon the restrictions from Vincent and McDonald, there were jobs in the Coeur d'Alene labor market that Davidson could perform. (Crum Deposition, pp. 36-37)

The Commission went on and addressed the issue of disability in excess of physical impairment. The Commission held that whether Davidson sustained disability in excess of his impairment turned upon his ability to work before the 1999 accident as compared with his work ability after the 1999 accident.

The vocational expert hired by the employer and surety, Doug Crum, found that Davidson was actually functioning at a light or sedentary work capacity prior to the 1999 accident at Riverland. The Commission found that Davidson's work capacity following his 1999 injury remained light and sedentary as both Dr. Vincent and Dr. McDonald found common ground there, along with vocational expert Douglas Crum. (R. p. 71). The Commission noted, therefore, that Davidson did not establish that his capacity for gainful activity had been reduced by the 1999 injury at Riverland.

The Commission did not retain jurisdiction in the case as both the treating surgeon and independent medical evaluation had found Davidson stable in early 2006 and there was no need for future treatment.

ISSUES PRESENTED ON APPEAL

1. Whether the Commission erred in failure to consider pain as a component of impairment.
2. Whether the Commission erred by not employing a two-tiered assessment of disability.
3. Whether or not the Commission abused its discretion by not retaining jurisdiction.
4. Whether the Commission erred by not awarding attorney fees to Davidson.

ARGUMENT

Davidson does not challenge the Industrial Commission's finding that he was not totally and permanently disabled.

None of the issues presented on appeal by Davidson directly attack the Commission finding that Davidson was not totally and permanent disabled. The Respondent State of Idaho, Industrial Special Indemnity Fund is only responsible for benefits in those cases in which an injured worker suffers total and permanent disability. Idaho Code § 72-332(1). None of the issues presented on appeal by Davidson nor the Brief submitted by Davidson attack the Commission finding that Davidson was not totally and permanently disabled. Moreover, the issue asserted by Davidson as to the issue of attorney fees was directed only as to the Respondent State Insurance Fund.

The Commission properly assessed impairment at 15% whole person for the cervical spine.

In the present case, the Industrial Commission made a finding that Davidson had sustained a 15% whole person impairment of his cervical spine as a result of the 1999 accident at Riverland. Davidson argues that the Industrial Commission erred by failing to consider pain in rendering this impairment rating. Davidson argues that the decision of the Industrial Commission on the issue of impairment cannot be sustained based upon the holding in Urry v. Walker and Fox Masonary Contractors, 115 Idaho 750 (1989). In Urry, the Court found that the issue of physical impairment was entirely derivative of the pain issue. In reversing the Industrial Commission in the Urry case, the Court found that

the Commission had treated the injured worker's pain complaints not as a medical factor in determining physical impairment, but as a non-medical factor to be considered in determining a disability rating only if physical impairment were otherwise found to exist. The Court held as follows:

Because it relates to functional loss, pain is a medical factor to be considered in determining impairment itself. When a physician is satisfied that pain is genuine, it can be used like pathology or loss of structural integrity to measure the extent of an impaired function.

Urry v. Walker, *supra*, p. 755.

A determination of physical impairment is a question of fact for the Industrial Commission. Soto v. J. R. Simplot, 126 Idaho 536, 539 (1994). The Supreme Court exercises free review over the Commission's legal conclusions, but does not disturb factual findings that are supported by substantial and competent evidence. Ewins v. Allied Sec., 138 Idaho 343 (2003). "*Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.*" *Id.* The Supreme Court reviews all facts and inferences in the light most favorable to the party who prevailed before the Commission. Taylor v. Soran Rest., Inc., 131 Idaho 525 (1998).

The argument advanced by Davidson is that the Idaho Industrial Commission adopted the impairment rating of Dr. Vincent, who it is alleged refused to consider pain as a component of his physical impairment rating. Dr. Vincent, however, was referring to the fact that the Guides to the Evaluation of Permanent Impairment, 5th Edition, use the

conventional rating system, which is based on objective findings of organ dysfunction. Cocchiarella, L. (2001) Guides to the Evaluation of Permanent Impairment, 5th Ed., p. 573.

A review of Dr. Vincent's deposition demonstrates that Dr. Vincent paid a great deal of attention to the pain complaints of Davidson and it was Dr. Vincent who initially recommended that Davidson should be referred to a pain clinic for management of his pain complaints. (Defendant's Exhibit 2, p. 115)

The deposition of Dr. Vincent demonstrates that Dr. Vincent considered Davidson's pain complaints in arriving at his impairment rating, but Dr. Vincent found that Davidson suffered from symptom embellishment (Dr. Vincent Deposition, p. 23) and that his pain complaints were far in excess of any objective findings to support it. (Dr. Vincent Deposition, p. 24) Dr. Vincent specifically addressed the issue of the pain component in determining Davidson's overall physical impairment rating and noted that the Guides 5th Edition in Chapter 18 do allow for an increase in the physical impairment rating based upon pain:

Q. Well, it's a preface to a question. My question: If you would consider pain, and you've already said there's an organic basis for it, would you think that Davidson, in fairness to him and the Idaho system would be entitled to a higher impairment rating than you opined without considering pain?

A. As I determined following the additional information I had, particularly with his not wanting to go through any further pain clinic, that *I determined at that point that his symptom embellishment was not related to his injury of record*. So therefore, my opinion is that his pain is so in excess of what one would expect that it would not be a proper assessment

to use. The AMA Guides do have a pain section for which you can combine or add to whatever the impairment has been given.

(Dr. Vincent's Deposition, p. 78) (emphasis added).

In summary, this is a case in which the initial independent medical evaluation done by Drs. Jessen and Larson in June of 2003 provided for a 15% whole person impairment for Davidson. This rating was confirmed by Dr. Vincent, who rated Davidson a 15% whole person impairment in the spring of 2006 following the final cervical surgery. This rating was further confirmed by a May 2006 note by Dr. McDonald, the treating surgeon, who initially agreed with the 15% impairment rating given by Dr. Vincent. Dr. McDonald later backtracked from the 15% impairment, but did not provide an opinion as to the appropriate rating.

The overwhelming evidence in this case is that Davidson sustained a 15% whole person impairment as a result of the 1999 industrial accident. It is disingenuous at this stage of the proceeding for Davidson to complain about the 15% impairment rating when Davidson did not provide the Commission with any evidence as to what an appropriate rating would be at hearing before the Industrial Commission

**The Commission properly determined that Davidson had
no disability in excess of impairment.**

Davidson complains that the Commission failed to employ a two-tiered assessment of disability as set forth in Page v. McCain Foods, Inc., Docket No. 33158 (2008). Davidson argues that the Commission should evaluate a claimant's permanent disability in light of all his physical ailments resulting from the industrial accident and

any preexisting conditions existing at the time of the evaluation. Thereafter, the Commission must determine the amount of permanent disability attributable to the current industrial accident. Davidson is apparently asking that the case be remanded so the Commission can set forth a so-called “meaningful analysis of total disability from all sources” and then allocate pursuant to the two-tiered mandate of Page.

A review of the Industrial Commission decision in the present case makes clear that the Commission did engage in the two-step process mandated by the Idaho Supreme Court. First, the Commission found that Davidson was not totally and permanently disabled in light of all his physical impairments resulting from the both the industrial accident and any preexisting conditions. Davidson argued in his brief that he was totally and permanently disabled pursuant to the odd-lot doctrine. The Commission found that Davidson had made no meaningful attempt to find work since his 1999 injury nor that he or vocational counselors or others on his behalf searched for work and no work was available. As the Commission indicated, the crux of Davidson’s odd-lot argument came down to the futility requirement that it would be futile for him to look for work. Both Dr. McDonald and Dr. Vincent indicated that Davidson could perform light and sedentary work activities. Davidson relied on the testimony of Mr. Moreland, a vocational expert. The Commission rejected Mr. Moreland’s testimony that Davidson was totally and permanently disabled because it was based solely upon Dr. McDonald’s response to a June 14, 2006, letter written to him by Mr. Moreland.

In the present case, the Commission made separate findings, as to the issue of permanent disability in light of all of Davidson's physical impairments from the 1999 industrial accident and from his preexisting conditions. The Commission found that in light of all the factors Davidson was not totally and permanently disabled but was capable of light and sedentary work activities.

Second, the Commission found that the 1999 accident did not add to the disability of Davidson. Simply put, Davidson was limited to light and sedentary employment prior to the 1999 accident and was likewise limited to sedentary and light employment after the 1999 accident. His disability simply did not increase. The Commission correctly applied the two-tiered approach mandated by Page v. McCain Foods, Inc., Docket No. 33158 and by Horton v. Garrett Freightlines, Inc., 115 Idaho 912 (1989).

Davidson also accuses both the Commission and Referee of being biased against him. Davidson complains about one sentence in the Commission's decision where it is stated:

Claimant's several fleeting contacts with ICRD staff were undertaken only to provide an appearance that he was interested in returning to work.

(Record, p. 67)

Despite the assertion by Davidson that this statement implies a finding on the issue of credibility as it relates to Davidson's testimony, it is simply a comment upon the evidence in the case. Nowhere in the decision does the Referee make a finding that Davidson's testimony was not credible. Moreover, the comment by the Referee was

supported by substantial and competent evidence. The records of the Idaho Industrial Commission Rehabilitation Department contain numerous instances to support the Referee's finding. (Defendant's Exhibit 8)

In May of 2000, the ICRD office was not able to locate Davidson. (Defendant's Exhibit 8, p. 1059) In August of 2000, the consultant noted that he had not had any contact with Davidson. (Defendant's Exhibit 8, p. 1059)

In April of 2004, Davidson told the Industrial Commission Rehabilitation Office that he wished to receive a large settlement that would help him start up his own business. (Defendant's Exhibit 8, p. 1050) He told the ICRD office he was not interested in pursuing work options. (Defendant's Exhibit 8, p. 1050) His file was closed for a final time in June of 2004 with this note from the Industrial Commission worker on his case:

He further states a desire to obtain a settlement and move on with his life. He did not communicate a desire to pursue any other option. Based upon the unrealistic view of vocational exploration, I find the ICRD services will not benefit this claimant and therefore I am closing the rehabilitation file.

(Defendant's Exhibit 8, p. 1050)

The conclusion that Davidson lacked motivation with regard to his return to work was well supported by the record. The Commission's finding on weight and credibility should not be disturbed on appeal if they are supported by substantial and competent evidence.

Davidson likewise complains as to the Commission's criticism of the testimony of Davidson's vocational expert, Mr. Moreland. The Commission did criticize the use by Mr. Moreland of a letter he sent to Dr. McDonald requesting that the doctor check a box and answer "yes" or "no". The Commission stated that detailed medical records compiled by the physician and dictated in his own words were much more persuasive than the method used by Mr. Moreland. (Record, p. 69)

The Commission also criticized Mr. Moreland's letter because he asked the doctor if Davidson could perform sedentary work, leaving out the question concerning whether Davidson could perform light-duty work. The Referee noted that by carefully phrasing the question to Dr. McDonald, Mr. Moreland assured a response that reduced Davidson's employability. (Record, p. 68) This was critical to the case since Mr. Moreland admitted that if Davidson could perform light work activities, there were plenty of jobs available within his limitations. This, of course, would negate a finding of total and permanent disability. Mr. Moreland specifically chose not to ask Dr. McDonald whether or not Davidson could perform light work.

Davidson's criticism of the comment concerning only wanting to give an appearance of cooperation with the IRCD office, and the comments concerning Mr. Moreland's testimony, are supported by substantial and competent evidence contained in the record. It is precisely these type of factual findings that should not be disturbed on appeal.

**There is no basis for the Industrial Commission
to retain jurisdiction in this case.**

Davidson argues that the Industrial Commission committed error by not retaining jurisdiction in this case. Despite overwhelming evidence to the contrary, Davidson makes the bold assertion that every witness in the case testified that Davidson's neck condition was not stable and would only get worse. As Davidson acknowledged in his brief, both his treating physician and surgeon, Dr. McDonald, and the independent medical evaluator, Dr. Vincent, found Davidson to be stable and ratable in 2006. In fact, Davidson's own physician found him stable in October of 2005. (Defendant's Exhibit 2, p. 16)

Dr. Vincent recommended that Davidson go to a pain clinic at the time of his evaluation in January of 2006. Davidson refused to even consider a multi-dimensional pain clinic and therefore both Drs. Vincent and McDonald determined that he was stable. It is ironic that Davidson now requests that the Commission retain jurisdiction nine years after his industrial injury, in light of the fact that he refused to consider additional treatment at a pain clinic when that was recommended by the independent medical evaluator.

There is no evidence in the record that Davidson's condition is progressive and not stable other than the assertion of Davidson's legal counsel.

CONCLUSION

In this case, there is substantial and competent evidence that supports the Industrial Commission's finding of a 15% whole person impairment related to Davidson's neck injury. Both Drs. Vincent and McDonald were well aware of the chronic pain situation Davidson was in. The post-hearing deposition of Dr. Vincent is devoted in large part to a discussion of the issue of symptom magnification and embellishment, as well as whether the impairment rating for Davidson should be increased based upon his chronic pain complaints. The Commission, in adopting Dr. Vincent's 15% impairment rating, recognized that in this case, the pain complaints far outweighed any objective findings such that it was not appropriate to increase the impairment rating based upon Davidson's chronic pain situation.

Furthermore, it is clear that the Industrial Commission properly employed the two-tiered disability assessment mandated by the Supreme Court. The Commission considered the issue of disability in light of all the physical impairments resulting from both the 1999 accident and Davidson's preexisting conditions and secondly, determined the amount of disability attributable solely to the industrial accident of 1999. The Commission found specifically that Davidson's disability before 1999 was the same as his disability after the 1999 accident

Finally, there is simply no evidence in the record to indicate that Davidson's condition is not stable and is progressing. Both the treating surgeon and the independent medical evaluator have indicated that Davidson is stable. There simply is no basis at this

date, some nine years after the industrial injury, for the Industrial Commission to retain jurisdiction. The Findings of Fact and Conclusions of Law of the Idaho Industrial Commission should be affirmed

DATED this _____ day of May, 2008

THOMAS W. CALLERY
Attorney for Respondent State of Idaho,
Industrial Special Indemnity Fund

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief was this ____ day of May, 2008,

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